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HAROLD B. WILLEY,

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 513

UNITED RAILROAD OPERATING CRAFTS, a Labor Organization; A. W. LEE, C. C. ANDERSON and O. J. KOEFGAARD, Individually and on Behalf of All Members of the Plaintiff Railroad Organization as a Class Who Are Too Numerous to Be Made Parties,

*Petitioners,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

## BRIEF IN SUPPORT THEREOF

CLIFFORD HOOD,
*Counsel for Petitioners.*
GERALD D. HILE,
GERALD SHUCKLIN,
*Of Counsel for Petitioners.*

Office and Post Office Address:
533 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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# Supreme Court of the United States

OCTOBER TERM, 1953

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| UNITED RAILROAD OPERATING CRAFTS, a Labor Organization; A. W. LEE, C. C. ANDERSON and O. J. KORTGAARD, Individually and on Behalf of All Members of the Plaintiff Railroad Organization as a Class Who Are Too Numerous to Be Made Parties, *Petitioners,* | No. ..... |
| VS. | |
| NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents.* | |

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*To the Honorable, The Supreme Court of the United States:*

Your Petitioner respectfully shows:

### SUMMARY OF THE MATTER INVOLVED

Your petitioner, the United Railroad Operating Crafts, a railway labor organization, A. W. Lee, C. C. Anderson, O. J. Kortgaard, members of the United Railroad Operating Crafts, individually and on behalf of all members of the petitioning organization as a class, who are too nuemerous to be made parties of the action, seek to review the judgment of the United

States Court of Appeals for the Ninth Circuit entered on November 6, 1953, which remanded the petitioners' action to the United States District Court for the Western District of Washington with directions to dismiss petitioners' cause of action (R. 105), for want of jurisdiction.

Petitioners commenced their action in the District Court of the United States vs. the Northern Pacific Railway Company, Respondent, in which action the Brotherhood of Railroad Trainmen was allowed to intervene by the District Court. Jurisdiction of the District Court was claimed by virtue of diversity of citizenship (Title 28, U.S.C., §1332) and by virtue of Title 28, U.S.C., §1337, conferring original jurisdiction on the court of any civil action or proceeding arising out of any act of Congress regulating commerce * * * (R. 3, 4). The individual petitioners, members of the United Railroad Operating Crafts are employees of the Northern Pacific Railway Company, a carrier engaged in interstate commerce and a Wisconsin corporation (R. 4, 5). Prior to January 10, 1951, the Railway Labor Act (Section 151 U.S.C., *et seq.*) and particularly Sections 151a and 152, fourth and fifth gave complete freedom to employees of railroads to organize and bargain collectively through representatives of their own choosing and complete freedom to join or not to join a labor organization of their own choosing. As of January 10, 1951, the so-called "Union Shop Amendment" of the Railway Labor Act (Title 45, U.S.C., §152 eleventh) became effective, which provided, in substance, that a carrier and a collective bargaining agent be permitted to enter into agreements requiring as a

*condition of continued employment* (italics ours) that employees of the crafts and classes represented become members of the collective bargaining agent within sixty (60) days from the beginning of such employment or the effective date of such agreement, which ever be later, with the further proviso (152 U.S.C., eleventh (c)) that the requirement of membership in the collective bargaining agent be satisfied if the employee holds or acquires membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act admitting to membership employees engaged in train and yard services.

Respondent, Brotherhood of Railroad Trainmen, is the collective bargaining agent for such services on respondent carrier and individual petitioners are engaged in such services, and petitioner, United Railroad Operating Crafts, admits to membership employees in such service. Effective as of September 1, 1951, respondent carrier and respondent, Brotherhood of Railroad Trainmen amended their collective bargaining agreement (R. 5) and in accordance with the provisions of said agreement (R. 12), provided in substantially statutory language, the provisions of Title 45, U.S.C., §152 eleventh. Pursuant to the agreement (R. 12 at R. 15), the respondent, Brotherhood of Railroad Trainmen, caused hearings to be held relative to the union membership of the individual petitioners and thereafter pursuant to the decision of the Chief of Personnel of the Northern Pacific Railway Company (R. 24, 25, 26) individual petitioners received notice of discharge upon the grounds that * * * "Membership in

the United Railroad Operating Crafts does not satisfy the requirements of that agreement. Accordingly, your employment as yardman at Seattle yard will be terminated in accordance with the provisions of said agreement effective January 15, 1953 /s/ T. J. Kane."

As a result of the notice of discharge this action was brought in the United States District Court for the Western District of Washington (R. 3) by way of preliminary injunction to reinstate the individual petitioners, prevent further discharges of members of petitioner labor organization, for permanent similar relief and for damages (R. 3-R. 11) and as stated in Paragraph VII of Plaintiff's Complaint (R. 7) "The sole question involved in this litigation is whether or not the members of the plaintiff labor organization are, in view of the provisions of the National Railway Labor Act and particularly Title 45, U.S.C., §152 eleventh, entitled to employment with the defendant carrier while maintaining their membership solely in the plaintiff labor organization (R. 7). A preliminary injunction was granted.

After issues being joined by the filing of Answers on behalf of the respondent, Northern Pacific Railway Company (R. 59), and the Brotherhood of Railroad Trainmen (R. 57), which admitted jurisdiction by reason of diversity of citizenship, motion was made by the Brotherhood of Railroad Trainmen (R. 62), which, in substance, claimed lack of jurisdiction of the action in the District Court maintaining that the jurisdiction of the Railroad Adjustment Board over the controversy was exclusive, among other things (R. 62). As a result

of the second Motion to Dismiss, after issues being joined, an Order and Decree was entered by the trial court (R. 65) which provided, in substance, that the Temporary Injunction then in effect be maintained; that the petitioners present their claims to the Railroad Adjustment Board within thirty days or suffer penalty of dismissal of their action; that the Motion to Dismiss for Want of Jurisdiction be denied and that jurisdiction of the trial court be retained pending the decision of the Railroad Adjustment Board for such rulings and procedures that might be appropriate in light of the rulings made by the Board. From the portion of the Order and Decree adverse to petitioners, *i.e.*, requiring and prosecution of claims before the Adjustment Board, or in the alternative, have petitioners' cause of action dismissed, petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The court, on November 6, 1953, entered its opinion and judgment (R. 99 and R. 105) directing the dismissal of petitioners' cause for action for want of jurisdiction upon the basis that sole jurisdiction lay in the Adjustment Board.

## JURISDICTION

Jurisdiction of this court is invoked under Title 28, U.S.C. Sec. 1254 (1) (62 Stat. 928).

## QUESTIONS PRESENTED

1. Does the incorporation of a Federal Statute granting an absolute right to a class, when incorporated in a collective bargaining agreement, make such statute subject to collective bargaining between an employer and the collective bargaining agent for employees?

2. Does an agreement between a carrier and a collective bargaining agent, incorporating the language of the statute (45 U.S.C. 152 eleventh) and particularly the words "national in scope" remove from the courts statutory interpretation and transfer such right of interpretation to a non-judicial, non-governmental agency, *i.e.*, the Railroad Adjustment Board?

3. Has the Congress delegated to the Railroad Adjustment Board the exclusive right to determine the meaning of the words "national in scope" in the 1951 amendment to the Railway Labor Act (45 U.S.C. 152 eleventh)?

4. Where the collective bargaining agent seeks the discharge of carrier employees for violation of the collective bargaining agreement in not being members of the collective bargaining agent, and pursuant thereto, the carrier makes a determination that such employees should be discharged upon the grounds that their membership in the petitioner union does not satisfy the agreement, is the ultimate question whether or not the United Railroad Operating Crafts is a union "national in scope" within the meaning of 45 U.S.C. 152 eleventh (c), where the statute must be interpreted, made a matter of interpretation of a collective bargaining agreement within the exclusive jurisdiction of the National Railroad Adjustment Board, or are the courts the forum to determine the meaning of the statute?

5. Is the National Railroad Adjustment Board the exclusive agency to make a final determination of the meaning of 45 U.S.C. 152 eleventh (a) and (c) and particularly the words "national in scope" where the Con-

gress has not specified any criteria by way of definition and no specific delegation has been made to the Adjustment Board?

6. Is not the National Railroad Adjustment Board, whose members are selected exclusively by railroads and by railway labor organizations and who are paid exclusively by the respective organizations they represent, essentially a private body or agency and as such constitutionally incapable of receiving a delegation of lagislative or judicial power?

**REASONS FOR THE ALLOWANCE OF THE WRIT**

The reasons relied upon by petitioner for allowance of the Writ are as follows:

1. A fundamental question is presented as to whether or not the interpretation of a Federal statute is a matter for court decision or if the interpretation and meaning of a Federal statute can be determined finally by an agency (The National Railroad Adjustment Board) which is neither judicial, quasi-judicial nor governmental.

2. In the opinion of the petitioner the meaning of the statute involved (45 U.S.C. §152 eleventh) should be determined by the courts, particularly in view of the fact that the jurisdiction of the National Railroad Adjustment Board is a limited jurisdiction and its function is to interpret collective bargaining agreements, *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U.S. 711, 89 L.ed. 1886.

3. The fact that the provisions of a statute (45 U.S.C. 152 eleventh (a), (c)) are included in a collective bar-

gaining agreement do not convert the statute and particularly (c) thereof to a matter subject to collective bargaining to the end that a positive right granted by the statute may be dissipated by the parties to the agreement, in interpretation, to the detriment of a minority not parties to the collective bargaining agreement.

4. Under the Railway Labor Act, 45 U.S.C. 151a, the purposes of the Act reflect that employees shall be free in the matter of self organization, and association and that there shall be no limitation upon freedom of association or any denial as a condition of employment of the right of employees to join a labor organization. The Act, 45 U.S.C. §152 fourth and fifth, carries out the intent. The only limitation being the 1951 amendment (45 U.S.C. §152 eleventh) providing for so-called "Union Shop Agreement" which in (a) permits the entering into of Union Shop Agreements and in (c) exempts employees from belonging to the collective bargaining agent if they belong to a labor organization "national in scope" organized in accordance with the Act. Clearly, the statute confers positive rights to what might properly be termed a minority, i.e., employees who do not belong to the collective bargaining agent, but who belong to another labor organization. If the courts do not have jurisdiction to interpret the statute a "freeze" will occur to the end that no new railroad union may exist since carrier employees who exercise their rights to organize have no adequate administrative remedy via the Adjustment Board, it being composed of carrier representatives paid by the carriers and union members appointed by the so called "standard" unions and paid by them; this is demonstrated by

the case of Milton Hanson in which the parties to dispute before the National Railroad Adjustment Board, First Division, were Brotherhood of Locomotive Firemen and Enginemen and the Chicago, Burlington & Quincy Railroad Co., Award No. 16 475, Docket No. 30 074, attached hereto as "Appendix A."

5. The matters presented in this case are novel since to the petitioners' knowledge no decision of this court has ever been rendered regarding the 1951 amendment to the Railway Labor Act (45 U.S.C. §152 eleventh) although there have been a number of District Court cases which are in disagreement as to jurisdiction as between the courts and the Adjustment Board and the petitioners are advised that a Petition for a Writ of Certiorari has been filed in this court by the *United Railroad Operating Crafts, et. al. v. William Wyer, as Trustee, et. al.,* involving substantially the same questions as are involved in this action. This case (*Wyer*) is from the United States Court of Appeals for the Second Circuit and we are advised that the Second Circuit held that the courts are without jurisdiction.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue from this court directed to the United States Court of Appeals for the 9th Circuit to the end that the opinion and judgment of the United States Court of Appeals for the 9th Circuit holding that the petitioners' cause of action in the United States District Court for the Western District of Washington should be dismissed for want of jurisdiction and that the matters complained of by the petitioners should be determined exclusively under the Railway Labor Act,

may be reviewed and determined by this court and that the judgment below remanding petitioners' cause of action to the District Court with directions to dismiss be reversed by this court and that the petitioners have such other and further relief as this court may deem proper.

DATED this 24th day of December, 1953.

Respectfully submitted,

CLIFFORD HOOF,
*Counsel for Petitioners.*

GERALD D. HILE,
GERALD SHUCKLIN,
*Of Counsel for Petitioners.*

## CERTIFICATION OF COUNSEL

I, CLIFFORD HOOF, counsel for petitioners herein, do hereby certify that the within and foregoing Petition is in my opinion well founded and the same is not interposed for delay.

CLIFFORD HOOF,
*Counsel for Petitioners.*

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*Respondents.*

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## BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the 9th Circuit is Cause No. 13,539 before that court and is not yet found in the official reports. The opinion is set forth in full, however, at (R. 99-104, inclusive). The Interlocutory Order of the United States District Court for the Western District of Washington, from which an appeal was taken by the petitioners to the United States Court of Appeals from those portions of the order adverse to petitioners and from which an appeal was taken to the United States Court of Appeals by respondent, Brotherhood of Railroad Trainmen, from those portions of the Order adverse to it is unreported, however, the Order is set forth at length at (R. 65-67, inclusive).

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## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was rendered November 6, 1953. No petition for rehearing was made. The statutory provision sustaining the jurisdiction of this court is Title 28, U.S.C. §1254 (1).

## STATEMENT OF CASE

Your petitioners, A.W. Lee, C. C. Anderson and O. J. Kortgaard, are residents of the State of Washington and employees of respondent, Northern Pacific Railway Company, a Wisconsin corporation, engaged in interstate commerce, and engaged in such commerce in the State of Washington, maintaining therein tracks and other railroad facilities. Petitioner, United Railroad Operating Crafts, is a labor organization contended to be "national in scope" and organized in accordance with the Railway Labor Act. Individual petitioners are members of petitioner, United Railroad Operating Crafts. The action herein brought by the petitioners in the District Court for the Western District of Washington, Northern Division, as a class action, was for the purpose of reinstatement of their employment with respondent, Northern Pacific Railway Company, and to enjoin the discharge of further members of petitioner labor organization from respondent, Northern Pacific Railway Company, solely because of union membership, they having been discharged by reason of the fact that they did not belong to the collective bargaining agent for the crafts and classes involved, namely, the intervenor respondent, Brotherhood of Railroad Trainmen. It was, and is contended by the petitioners

that membership in the petitioner, United Railroad Operating Crafts, satisfies the requirements of the Union Shop Amendment of the Railway Labor Act (45 U.S.C. §152 eleventh) wherein a carrier and a collective bargaining agent may enter into an agreement requiring carrier employees to become members of the collective bargaining agent, but with the proviso that membership in the collective bargaining agreement is not required if such employees belong to a labor organization "national in scope" organized in accordance with the Railway Labor Act. As is shown by the petition herein, the District Court held upon Motion to Dismiss For Want of Jurisdiction, that jurisdiction of this cause was in the District Court, but that petitioners should present their claims to the National Railroad Adjustment Board and jurisdiction of the cause was retained for such other and further rulings as might be proper in light of the action of the Railroad Adjustment Board. The United States Court of Appeals for the Ninth Circuit reversed the Order of the United States District Court with directions to dismiss the action of the petitioners for want of jurisdiction. A more detailed summary of facts is set out in the preceding petition which is hereby adopted and made a part of this brief.

## SPECIFICATION OF ERRORS

The United States Court of Appeals for the Ninth Circuit erred in holding that the District Court was without jurisdiction to entertain petitioners' complaint.

The court erred in holding that the matters con-

tained in petitioners' complaint in the district Court constituted a dispute which the Congress provided should be determined exclusively under the Railway Labor Act.

The court further erred in holding that the Railroad Adjustment Board had jurisdiction to interpret the meaning of "a labor organization national in scope" (45 U.S.C. §152 eleventh (c)).

The court further erred in remanding petitioners' cause of action to the District Court with directions to dismiss the cause for lack of jurisdiction.

## ARGUMENT

### I

### Analysis of the Applicable Statutes

Prior to January 10, 1951, the Railway Labor Act (Title 45, U.S.C. §151, *et seq.*) provided:

The intent of the Act (45 U.S.C. §151a) was (2) to forbit any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization and (3) to provide for the complete independence of carriers and of employees in the matter of self organization to carry out the purposes of the Act.

The next section, 45 U.S.C. §152 (fourth), gave the right to employees to organize and bargain collectively through representatives of their own choosing, granting to the majority of any craft or class of employees, the right to determine who should be the representative for collective bargaining.

The 1951 amendment known as the "Union Shop Amendment" (45 U.S.C. §152 eleventh) provides that employers and the collective bargaining agent may (a) make agreement requiring as a *condition of continued employment* that within sixty days from the beginning of such employment or the effective date of such agreement, whichever is the later, employees represented by the collective bargaining agent are required to become members of the collective bargaining agent with the condition in eleventh (c):

> "The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * * "

It is of particular note that eleventh (d) provides as follows:

> "Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

Having in mind, therefore, that the Act intended and intends to give complete freedom to organize and to bargain collectively and for employees to select a

collective bargaining agent of their own choosing, the 1951 amendment made but one limitation, that being that as a condition of continued employment, an employee in the crafts or classes represented must belong to the collective bargaining agent or a labor organization "national in scope."

The individual petitioners as well as the other members of their local organization and nine other locals on the Northern Pacific System are directly affected by this action. Indirectly affected are the members of the petitioner, United Railroad Operating Crafts (including the employees of the respondent, North Pacific Railway Company) in approximately two hundred locals of the organization employed on approximately sixty railroads in the United States and in approximately thirty-six states of the United States.

The collective bargaining agent respondent, Brotherhood of Railroad Trainmen, sought the discharge of individual petitioners upon the grounds that they did not belong to respondent, Brotherhood of Railroad Trainmen. Respondent, Northern Pacific Railway Company, concurred, determining that United States Railroad Operating Crafts did not satisfy the requirement of the collective bargaining agreement. By reason of injunction in effect, the Northern Pacific Railway Company has been restrained from discharging employees who are members of United Railroad Operating Crafts where the matter of union membership only is involved.

## II.

### Jurisdiction of the National Railroad Adjustment Board

The Railroad Adjustment Board was created pursuant to the provisions of Title 45, U.S.C. §153, *et seq.*, section 153 (h) providing for the Board to be composed of four Divisions independent of each other. The First Division to have jurisdiction over what is generally known as the operating crafts, i.e., train and yard employees and as assigned to it under (i) of the same section the following:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The composition of the Adjustment Board pursuant to (45 U.S.C. Section 153) is divided equally between carrier representatives and union representatives who by the provisions of (g) respectively paid by the party or parties they represent.

The Adjustment Board is not a judicial or quasi-judicial body, *Watson v. Missouri, Kansas & Texas R. Co.*, 173 S.W.(2d) 357, and it is not a "governmental

agency" *Dahlberg v. Pittsburgh & L. & E.*, 138 F.(2d) 121.

The jurisdiction of the Adjustment Board has to do with the interpretation of collective bargaining agreements *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 89 L.ed. 1886, and is limited to disputes over interpretation or application of contracts between carriers and other employees, *Southern Pac. Co. v. Joint Council Dining Car Emp., Locals 456 and 582* (C.C.A., Cal. 1947) 165 F.(2d) 26, Cert. denied 68 S.Ct. 608, 333 U.S. 838, 92 L.ed. 1122.

## III.

### The Court and Not the Adjustment Board Should Determine the Questions Involved in This Action

As was stated in petitioners' complaint in the District Court (R. 7) the sole question involved in this litigation is whether or not the members of petitioner labor organization are, in view of the provisions of the Railway Labor Act and particularly Title 45, U.S.C., Section 152 eleventh, entitled to employment with the respondent carrier while maintaining their membership solely in petitioner labor organization.

The further question presents itself as to whether jurisdiction to so determine is in the Adjustment Board or in the Courts.

The petitioners respectfully contended that by virtue of the provisions of Title 45, U.S.C. 152 eleventh, they have been granted a statutory right to belong to a union other than the collective bargaining agent, Bro-

therhood of Railroad Trainmen. The incorporation of the statute in the "Union Shop Agreements" (R. 12 (2) and R. 13 (3)) does not make the statute a matter of collective bargaining and rights or duties or imposed by statute cannot be bargained away by private parties, *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, *Fleming v. Warshawsky & Co.,* 123 F.(2d) 662.

It is likewise settled law that "to declare what the law is or has been is a judicial power; * * * ." 50 Am. Jur. Stat., Sec. 219 and the construction of a statute is a judicial function, *P. H. Mallen Co. v. Dept. of Finance,* 25 N.E.(2d) 43.

## IV.

### The Opinion of the United States Court of Appeals

The United States Court of Appeals in its opinion (R. 99) based its decision that the instant case was one for the Adjustment Board upon *Hayes v. Union Pacific Ry.,* 184 F.(2d) 337 and *Colbert v. Brotherhood of Railroad Trainmen,* 206 F.(2d) 9. We are advised that the *Colbert* case, *supra,* is at the present time on a Petition for Writ of Certiorari to this court. Insofar as the *Hayes* case, *supra,* is concerned the fourth Circuit in *Dillard v. Chesapeake & Ohio Ry. Co.,* 199 F.(2d) 948, stated that the doctrine of the *Hayes* case was in clear conflict with the later decision of this court in *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768. In neither case, as we read the opinion, (the *Hayes* case or the *Colbert* case) was the interpretation of the statute involved insofar as it concerns the jurisdiction of the court or of the Adjustment Board, under the provisions of 45 U.S.C. Section 152 eleventh.

The Court of Appeals likewise concluded that the grievance constituted a dispute which the Congress provided should be determined exclusively under the Railway Labor Act referring to *General Committee B.L.E. v. Missouri-K-T-R. R.*, 320 U.S. 323; *General Committee B. L. E. v. Southern Pac. Co.*, 320 U.S. 338; *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561; *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239.

Two of the cases, the *General Committee B. L. E. v. Southern Pacific Co.* and the *General Committee B. L. E. v. Missouri-K-T-R. R. Co.*, involved Mediation Board matters as to which of two unions was the proper collective bargaining agent and the other two cases, *Order of Railway Conductors of America v. Pitney* and *Slocum v. Delaware L. & W. R. Co.*, involved jurisdictional disputes between two unions, each having collective bargaining agreements, as to the work to be performed by the members of each union. We sincerely feel that the cases cited by the court below do not support its opinion and judgment.

## CONCLUSION

In conclusion, we respectfully submit that an examination of the statutes involved clearly show that there has been no delegation of authority to the National Railway Adjustment Board to make a determination as to what unions meet the requirement of being "national in scope" as provided in the Union Shop Amendment of the Railway Labor Act, nor is an agency which is not judicial, quasi-judicial or governmental capable of receiving a delegation of legislative or judicial powers, *Dahlberg v. Pittsburgh & L. E. R. Co.* (C.A. 3d 1943) 138 F.(2d) 121, 122-23; *Watson v. Missouri-K-T-R. Co.* (Ct. Civ. App. Tex. 1943) 173 S.W.(2d) 357.

As was recognized in the opinion of the court below (R. 99) opposing petitioners were the intervenor respondent herein, Brotherhood of Railroad Trainmen and as *Amicus Curiae* the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen. On the First Division of the Adjustment Board are five carrier representatives and five representatives of the so called "standard" unions. Of the five union members, one is a representative of the Trainmen, one is a representative of the Engineers and one is a representative of the Firemen. An examination of the *Hanson* case, "Appendix A" shows that the primary reason the board sustained the dismissal of Fireman Hanson was that no tribunal of competent jurisdiction had determined the meaning of the words "national in scope" and the United Railroad Operating Crafts had failed to prove that a tribunal of competent jurisdiction had determined the meaning

of the words "national in scope." The petitioners, therefore, can predict the outcome of each and every case of a member of United Railroad Operating Crafts that may come before the board with certainty and it seems to us that this action falls definitely within the doctrine of *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 89 L.ed. 173, wherein the court said:

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act * * * " (citing cases) "or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration * * * " (citing cases). "Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.
>
> "Section 3, First (i), which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to disputes between employees and their representatives. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board.' Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Congress,

1st Sess. Pt. 4, p. 7. Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since Sec. 3, First (c) permits the national labor organizations chosen by the majority of the crafts to prescribe the rules under which the labor members of the Adjustment Board shall be selected' and to 'select such members and designate the division on which each member shall serve,'' the Negro firemen would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made. In addition Sec. 3, Second provides that a carrier and a class or craft of employees, 'all acting through their representatives, selected in accordance with the provisions of this Act,' may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. *Tumey v. Ohio,* 273 U.S. 510, 71 L.Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243. There is no administrative means by which the Negro fireman can secure sep-

arate representation for the purposes of collective bargaining * * *.

"In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the right here asserted, to a remedy for a breach of the statutory duty of the bargaining representatives to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." (Citing cases)

In the opinion of the petitioners the doctrine of the *Steele* case, *supra,* and the cases following it was extended by the case of *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, as was recognized in *Dillard v. Chesapeake & Ohio Ry. Co.,* 199 F.(2d) 948. Under the *Howard* case, *supra,* we believe that where the rights of a minority are concerned the courts will protect those rights whether or not they belong to no union or to a union other than a collective bargaining agent where there is no adequate administrative remedy and where a clear statutory right is granted.

We respectfully submit that a decision of this court is necessary to clarify the rights granted to members of unions other than the so called "standard" unions and railroads under the Railway Labor Act.

We believe that the contention of petitioners that they have no administrative remedy is adequately demonstrated by the *Hanson* case, "Appendix A."

WHEREFORE, we respectfully request that the Petition for Writ of Certiorari herein be granted.

Respectfully submitted,

CLIFFORD HOOF,
*Counsel for Petitioners.*

GERALD D. HILE,
GERALD SHUCKLIN,
*Of Counsel for Petitioners.*

## APPENDIX A

Form 1

National Railroad Adjustment Board
First Division

Award 16 475
Docket 30 074

Parties to Dispute:

Brotherhood of Locomotive Firemen and Enginemen. Chicago, Burlington and Quincy Railroad Company.

Statement of Claim:

"Demand for removal of Fireman Milton P. Hanson, LaCrosse Division, from service of the Chicago, Burlington & Quincy Railroad account not maintaining membership in the Brotherhood of Locomotive Firemen and Enginemen as required by the provisions of the Union Shop Agreement, effective August 16, 1951. Also protest of the firemen denied service account failure to remove Hanson from service in conformity with demand and agreement."

Findings:

The First Division of the National Railroad Adjustment Board upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

The claim in this case is that the carrier be required to remove Fireman Milton P. Hanson from its service

because of his failure to maintain membership in a labor organization as required by the provisions of the Union Shop Agreement between the petitioner and the carrier.

Fireman Hanson has appeared by and through a representative of the United Railroad Operating Crafts, raising first, the question of our jurisdiction, and, second, contending on the merits that his membership in United Railroad Operating Crafts meets the requirements of Union Shop Agreement. He asserts that United Railroad Operating Crafts is a labor organization "national in scope," as used in the 1951 amendment to the Railway Labor Act.

A decision in this case depends upon whether or not United Railroad Operating Crafts is a labor organization "national in scope." So far as we are advised, there has been no final interpretation of the meaning of the words, "national in scope," as used in amendments to the Railway Labor Act, by any tribunal of competent jurisdiction. The submission on behalf of Fireman Hanson contains little, if any, evidence to support the proposition that United Railroad Operating Crafts is "national in scope," as used in the Union Shop Agreement. It is asserted that it holds the collective bargaining agreement for one craft of employes on one carrier. That could hardly be said to be a sufficient qualification. United Railroad Operating Crafts makes no showing that it has ever been adjudged to be "national in scope" by any tribunal of competent jurisdiction.

Assuming the most liberal interpretation of the

words "national in scope" in favor of the contention of Fireman Hanson, it does not appear that United Railroad Operating Crafts meets the most meager requirements to qualify as such at this time. Therefore, under the record before us in this particular case, this particular claim will be sustained.

Award:

Claim sustained per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of First Division.

Attest:
J. M. MACLEOD,
Executive Secretary.

Dated at Chicago, Illinois,
This 13th day of October, 1953.

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JAN 30 1

HAROLD B. WILL

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 513

---

UNITED RAILROAD OPERATING CRAFTS, a Labor Organization; A. W. LEE, C. C. ANDERSON and O. J. KORTGAARD, Individually and on Behalf of All Members of the Plaintiff Railroad Organization as a Class Who Are Too Numerous to Be Made Parties,

*Petitioners,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,

*Respondents,*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

## BRIEF FOR BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

---

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THE ARGUS PRESS, SEATTLE

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# Supreme Court of the United States

OCTOBER TERM, 1953

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| UNITED RAILROAD OPERATING CRAFTS, a Labor Organization; A. W. LEE, C. C. ANDERSON and O. J. KORTGAARD, Individually and on Behalf of All Members of the Plaintiff Railroad Organization as a Class Who Are Too Numerous to Be Made Parties, *Petitioners,* | No. 513 |
| VS. | |
| NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents.* | |

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

### OPINION BELOW

The opinion of the District Court (R. 73-77) is unreported. The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 208 F.(2d) 135, and is embodied in the transcript (R. 99-104).

### JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C. §1254 (1), 62 Stat. 928.

## QUESTION PRESENTED

Where Railway Labor Act provides that employees can comply with a Union Shop Agreement by belonging to a union, national in scope, and Union Shop Agreement so provides, does the court have jurisdiction to determine a controversy as to whether an employee is properly dischargeable because not belonging to a union, national in scope, where the employee contests his discharge and seeks reinstatement?

## SUPPLEMENTAL STATEMENT OF THE CASE

The Brotherhood of Railroad Trainmen, hereinafter called the "B.R.T.," the bargaining representative of trainmen and yardmen employed by the Northern Pacific Railway Company, hereinafter called the "carrier," entered into a Union Shop Agreement with the carrier on August 16, 1951, in accordance with notices given to the carrier pursuant to §6 of the Railway Labor Act (45 U.S.C.A. §156). As required by §2, Eleventh (c) of the Act (45 U.S.C.A., 1952 Supp. 152, Eleventh (c)) the Agreement provided that membership in the B.R.T. was satisfied by membership in any one of the labor organizations, *national in scope,* organized in accordance with the Railway Labor Act, and admitting to membership employees in the classes of trainmen and yardmen.

The agreement sets forth the procedure to be followed in administering it. It provides for a notice in writing to the employee claimed to have not complied with the agreement, a hearing after notice and representation of the employee by an employee of his own choice, a decision by the Division Superintendent of the

carrier, an appeal from this decision to the highest officer of the carrier designated to handle appeals and thereafter an appeal "to a tribunal having jurisdiction pursuant to law or agreement of claims or grievances arising between the parties to this agreement" (R. 15-19).

Notices that they were not in compliance with the Union Shop Agreement were given to the three individual petitioners. The procedures set forth in the agreement were followed; hearings were had before the Division Superintendent and thereafter the matter was considered by the highest officer of the carrier, resulting in a decision that the three individual employees had not complied with the agreement. By letters the three individuals gave notice of their dissatisfaction with the decision in accordance with the procedure set forth in the Union Shop Agreement (R. 27-29).

Thereafter, and on January 22, 1952, the individual petitioners abandoned their administrative remedy and together with the United Railroad Operating Craft, their labor organization, instituted the present action and obtained a restraining order enjoining the carrier from discharging the individual petitioners and all other persons of the same class by reason of the fact that such persons are members only of said labor organization and not for any other cause (R. 44-47).

On March 3, 1952, the District Court granted the motion of B.R.T. to intervene in said action (R. 55-56). Thereafter, the B.R.T. filed a motion to dismiss the complaint (R. 62-63) on the ground that the court lacked jurisdiction. After argument, the court entered

its decree staying further proceedings until the petitioners had prosecuted their greivances in accordance with the administrative procedures of the Railway Labor Act and continuing the injunction in effect pending further order of the court (R. 65-67). The petitioners appealed from that part of the decree of the District Court requiring them to seek administrative relief (R. 70-71) and the B.R.T. appealed from that part of the decree denying the motion to dismiss and continuing the injunction in effect (R. 72).

The United States Court of Appeals for the Ninth Circuit sustained the position of the B.R.T. and reversed the order of the United States District Court with directions to dismiss the action of the petitioners for want of jurisdiction.

## ARGUMENT IN SUPPORT OF COURT OF APPEALS DECISION

Respondent's position is that since petitioners have an adequate administrative remedy under the Railway Labor Act, the District Court is without jurisdiction.

### Railway Labor Act

Sec. 2 (5) (45 U.S.C.A. §151(a)) sets forth as one of the general purposes of the Railway Labor Act the following:

> " * * * To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 2, Second, of the Act (45 U.S.C.A. §152, Second) provides as follows:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 3, First (i) of the Act (45 U.S.C.A. §153 First (i)) provides as follows:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The statute authorizing the Union Shop Agreement was passed in January, 1951, and reads in parts as follows (45 U.S.C.A. §152, Eleventh):

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condi-

tion of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, which ever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service; that is, an employee engaged in any of the services or capacities covered in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds mem-

bership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in Paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

This amendment brought the railway labor union in line with other trade unions and gave them the right to bargain for and obtain in their contracts a union shop provision.

The purpose of the exception permitting an employee to belong to a labor organization, *national in scope,* was to meet the rather common situation in the industry where an employee shuttles back and forth between crafts or classes, depending upon the work available and his seniority. Thus, an employee may be working as a brakeman one week and a conductor the next. If the two unions (representing the brakemen and conductors respectively) had a rigid union shop agreement, the employee would be required to join both un-

ions in order to keep his job. The exception allows him to hold his job as a conductor although not a member of the conductors' union, if he is a member of the brakemen's union, and the same is a labor organization, *national in scope,* organized in accordance with the Railway Labor Act.[1]

It should be noted that the exception permitting membership in a labor organization other than the one holding the contract is limited to *operating* crafts. The unions representing other crafts (non-operating) can require a strict union shop agreement without any exceptions. Since the non-operating crafts do not have this shuttling back and forth, the reason for the exception does not exist.

**Jurisdiction of Railroad Adjustment Board**

The United States Supreme Court in unbroken consistency has held that where recourse may be had to the administrative tribunals established by the Railway Labor Act, the Courts are without jurisdiction. *General Committee, B.L.E. v. Missouri-K.-T-R.R.,* 320 U.S. 323, 327-328, 331-333, 337, 88L.Ed. 76; *General Committee, B.L.E. v. Southern Pacific Co.,* 320 U.S. 338, 342, 88 L.Ed. 85; *Order of Railway Conductors v. Pitney,* 326 U.S. 561 ,567-568, 90 L.Ed. 318; *Slocum v. Delaware, L. & W. R. Co.* (1950) 339 U.S. 239, 244,

[1] (See Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Congress Second Session on S.3295, pages 65-68, and also Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, Second Session on H. R. 7789, pages 29-32, 159.)

90 L.Ed. 795; *Order of Railway Conductors v. Southern Railway Co.*, (1950) 339 U.S. 255, 256, 94 L.Ed. 811.

In the *Order of Conductors of America v. Southern R. Co., supra,* the court recognized the danger of allowing a complainant to chose either the administrative tribunal or the court at his discretion, stating that unless he were confined to the administrative forum, there would be continuous races between litigants to file suits in the particular forum favored by them.

This foresight is illustrated in the situation prevailing at the present time. The U.R.O.C., the petitioning union, or its members, have commended actions similar to the instant case in New York (see *U.R.O.C., et al., v. Wyer, et al.,* 115 F.Supp. 359, 205 F.(2d- 53); in Ohio, (see *Lake, et al., v. Baltimore & Ohio Railway Co.,* 31 L.R.R.M. 2656); in Illinois (see *U.R.O.C., et al., v. Pennsylvania R. Co.,* 52 C. 1465, N.D. (Ill. E.D.); and in Michigan (see *Pigott v. Detroit, Toledo and Ironton R. Co.,* 33 L.R.R.M. 2093).

Thus, several different tribunals are being asked to adjudicate an issue which could competently and expeditiously be decided by an administrative forum better equipped through experience and background to decide the matter.

**The Phrase—"Labor Organizations National in Scope"**

The phrase, "labor organizations national in scope and organized in accordance with the Railway Labor Act" is not a novel one. The Railway Labor Act (45 U.S.C.A. §153) provides for the participation in the selection of representatives of the Railroad Adjust-

ment Board by "labor organizations national in scope" and organized in accordance with the Act. The same section of the Act provides for the determination of this qualification as follows:

> "In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of a neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding." (45 U.S.C.A. §153 (f)).

The same phrase appears in the Railroad Retirement Act (45 U.S.C.A. §228(a), the Carriers Taxing Act of

1937 (45 U.S.C.A. §261) and the Railroad Unemployment Insurance Act (45 U.S.C.A. §351).

The first mentioned Act establishes a retirement and pension system for railroad employees and other specified employees connected with the carriage by rail. The second Act provides funds for carrying out the retirement and pensions system. The third Act sets up a comprehensive plan for the payment of unemployment compensation to persons defined in the Act.

Under the Railroad Retirement Act, the Railroad Retirement Board determines whether one is an employer under the Act (45 U.S.C.A. §228(j) *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446, 90 L.Ed. 192). An employer under the Act is defined to include:

> "Railway Labor Organizations national in scope which have been organized in accordance with the provisions of Chapter 8 of this Title." (Chapter 8 being the Railway Labor Act.) (45 U.S.C.A. §228a.)

Whether a particular labor organization was one national in scope and organized in accordance with the Railway Labor Act has in the past been determined by the Railroad Retirement Board on several occasions.

Similarly, under the said Unemployment Act, the Railroad Retirement Board or the Director (45 U.S.C.A. §362(m)) has made such determination, *i.e.*, whether a labor organization is national in scope.

The proposition involved in the instant case, thus is one with which railroad administrative agencies have dealt and are dealing. It is a problem which they are

peculiarly equipped to handle. It would be unreasonable to adopt a position that an administrative agency was the proper tribunal in which to determine a proposition under one set of circumstances but improper under another. Under either, the factors determining the question and the considerations involved are the same.

**Statutory Interpretation by Railroad Administrative Agencies**

Regarding the power of an administrative agency established by the Railway Labor Act to interpret statutory language, in the case of *Switchmen's Union of N.A. v. National Mediation Board,* 320 U.S. 297, 88 L.Ed. 61, this Court specifically held that the National Mediation Board could do so. The Court stated:

> "In the present case the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear and no less essential to the performance of its duty."

The Court in the *Switchmen's* case referred to and approved the case of *Butte, A & P R. Co. v. U.S.,* 290 U.S. 127, 78 L.ed. 222. In the latter case the United States brought action to recover a sum paid by the Interstate Commerce Commission, contending the Commission had incorrectly interpreted the statutory language contained in an act providing for reimbursement to short-line railroads for losses due to government control of the main systems during World War I. The court in the *Butte etc.* case held that the I.C.C. had authority to interpret the statute and the court had no power of review.

If an administrative agency has authority to specifically interpret statutory language, as the court so held in the *Switchmen's* and *Butte* cases, certainly it has the authority to interpret a contract which follows statutory phraseology.

In the case of *General Committee, B.L.E. v. Southern Pacific Co.,* 320 U.S. 338, 342, 343, the court said:

> "The parties base their respective arguments not only on *the language of the Act* and its legislative history, but also on various trade union practices and analogous problems arising under the National Labor Relations Act. From these various material, each seeks to prove that Congress has fashioned a federal rule (enforceable in the courts) concerning the authority of a collective bargaining agent to represent various classes of employees on their individual grievances. *All of these would be relevant data for construction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were.*" (Underlining ours.)

The Railway Labor Act itself contemplates administrative interpretation of its provisions. Paragraphs Third, Fourth and Fifth of Section 2 of the Railway Labor Act (45 U.S.C.A. 152, Third, Fourth and Fifth) grant and impose certain rights and duties on carriers and employees. By paragraph 8 of section 2, said paragraphs Third, Fourth and Fifth are made a *part of the contract of employment* between the carrier and each employee. A casual reading of these paragraphs discloses various provisions therein subject to interpretation by the administrative agency, such as the word "coercion" in paragraph Third and the words "craft,"

"assist," and "coerce" in paragraph Fourth. The fact that this part of the employment contract is statutory does not oust the administrative agency from interpreting the contract. If it did, the benefits of the Act would, of course, in a substantial measure be dissipated.

## ANSWER TO ARGUMENT OF PETITIONER

Stated briefly, petitioners' position appears to be first, that the incorporation of the statute in the agreement is a bargaining away of a statutory right (page 21 of brief) and second, that the Railroad Adjustment Board would not accord petitioners a fair hearing (pages 23-26 of brief).

No basis exists for either contention. No statutory rights are being bargained away. Petitioners have no vested right in their jobs or their seniority status apart from the collective bargaining agreement. *Brooks v. Chicago, R.I. & P.R.Co.*, 177 F.(2d) 385; *Beeler v. Chicago, R.I.& P.Co.*, 169 F.(2d) 557. To a certain degree, every union shop agreement impedes the progress of a rival union to recruit new members. It does not, however, destroy vested rights. Even should the U.R.O.C. be held to be not national in scope, it is still entitled to solicit members and if it obtains a majority in any craft or class, can enter into a union shop contract like any other union. It must be remembered that the individual petitioners are not being asked to abandon the U.R.O.C., their present union, but only to join the union which at present has the collective bargaining contract, the B.R.T.

The agreement over which this controversy arises

does not infringe any statutory rights of petitioners; indeed, it expressly recognizes them. As the Circuit Court of Appeals states in its opinion in the present case (R. 103), there appears no reason why the statutory language "a labor organization, national in scope" cannot be determined by the Railroad Adjustment Board.

With respect to the second position that they would not receive a fair hearing, petitioners quote from the case of *Steele v. Louisville & N.R.Co.*, 323 U.S. 192, 89 L.ed. 173 (pages 24-26 of brief). The *Steele* case case dealt with an entirely different situation than exists here. That case held that the bargaining agent cannot make any agreement discriminatory against the minority group it represents because of race, creed or color. The complaint in the case showed that the negroes were being deprived of seniority in their jobs on the basis of a discriminatory labor contract.

The distinction between the *Steele* case and the present one is clear. There the labor contract discriminated against negro employees in violation of the Railway Labor Act. The agreement here is sanctioned by statute and is also *relied upon* by petitioners. No special group is being discriminated against.

The holding in the *Steele* case is limited to unauthorized and discriminatory labor contracts. The opinion states:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the crafts represented."

The *Steele* case sets forth a quotation from Administrative Procedure in Government Agencies, 77th Congress, to the effect that the only way an individual may prevail is by taking his case to the union and causing the union to carry it to the board. In the first place, the individual petitioners in this case have their own union to prosecute their grievance. Furthermore, the above-mentioned statement was published and the *Steele* case was decided before the case of *Elgin, Joliet and Eastern R. Co. v. Burley,* 325 U.S. 711, 89 L.ed. 1886, where this Court specifically held that an employee was entitled either personally or by his attorney to present his grievance to the Adjustment Board.

An examination of the cases docketed with and determined by the Adjustment Board will show it makes no discrimination because the employee may or may not be a union member and the Board has considered numerous cases of individual employees without sponsorship by a labor organization or by a labor organization which neither holds membership on nor participates in the selection of members of the Board.

The First Division of the Board (having jurisdiction over train and yard employees) consists of ten members, five of whom are selected by the carrier and five by the national labor organizations of the employees. (Section 3 First(h) of R.L.A. 45 U.S.C.A. §153 First (h)). Upon failure of any division to agree upon an award the Act provides for an impartial referee to be appointed either by agreement of the Division members, or failing that, by the National Mediation Board (Section 3 First (l) of R.L.A., 45 U.S.C.A. §153 First (l)).

Furthermore, Section 3 First(f) of the Act (45 U.S.C.A. §153 First(f) cited *supra,* provides for a board of three to determine whether a labor organization is *national in scope* so as to be entitled to participate in the selection of labor members on the Adjustment Board. Here again a neutral party is selected by the National Mediation Board to make the odd man on the board. The petitioners have made no effort to have their status determined by this agency.

The fact that petitioners may feel they would fare better in a court than before an administrative agency is no basis for the courts to assume jurisdiction. *Hampton v. Thompson,* 171 F.(2d) 535; *Radolph v. Missouri K-T.R.Co.,* 164 F.(2d) 4, 8, Certiorari denied, 334 U.S. 818, 92 L.ed. 1748; *Griffin v. Illinois Central R.R.Co.,* 88 F.Supp. 552, 6.

The fact that the Adjustment Board in the *Hansen* case (set out in the Appendix to petitioners' brief) found the U.R.O.C., under the facts there presented, not to be national in scope, is no precedent for the present controversy and no basis for a claim of prejudice against the petitioners. Under the facts there presented, showing the union held the collective bargaining agreement for one craft on one carrier, it would have been surprising if any other decision than the one reached were made. The statement in the opinion that no tribunal had interpreted the words "national in scope" was simply made in the course of the decision and was completely ancillary to the controlling reason for the decision.

The cases of *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 96 L.ed. 1283 and *Dillard v. Ches-*

*apeake & Ohio Ry. Co.,* 199 F.(2d) 948, cited in petitioners' brief, were cases where negroes were threatened with the loss of their jobs solely because of their color; obviously different situations than exists in the present suit. The cited cases stated the claims there involved could not be resolved by the interpretation of a bargaining agreement.

Petitioners state that the case of *Colbert v. Brotherhood of Railroad Trainmen,* 206 F.(2d) 9, cited by the Ninth Circuit Court in support of its opinion in the present case is on a Petition for Writ of Certiorari to this Court. On January 11, 1954, the said Writ was denied.

## CONCLUSION

No conflicts exist in the Courts of Appeal as to the issues here involved. The Court of Appeals for the Second Circuit, the only other Court of Appeals to decide the point at issue reached the same result as did the Court of Appeals for the Ninth Circuit. (See *U.R.O.C., et al., Wyer, et al.,* 115 F.Supp. 359, 205 F.(2d) 153). The decisions of the two Courts of Appeal are entirely proper and in accord with the previous decisions of this Court on the subject.

We respectfully submit that the petition for *certiorari* be denied.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1953

No. 513

UNITED RAILROAD OPERATING CRAFTS, a Labor Organization; A. W. LEE, C. C. ANDERSON and O. J. KORTGAARD, Individually and on Behalf of All Members of the Plaintiff Railroad Organization as a Class Who Are Too Numerous to be Made Parties,

*Petitioners,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,

*Respondents.*

## STATEMENT OF RESPONDENT NORTHERN PACIFIC RAILWAY COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent Northern Pacific Railway Company does not oppose, but supports the petition for the writ in this case for the reasons hereinafter stated.

The judgment below decides a question important to the administration of the 1951 Union Shop Amendment of the Railway Labor Act (45 U. S. C. § 152 Eleventh) which should be settled by a decision of this Court. That Amend-

ment authorized so-called "union shop" agreements between railroads and the collective bargaining agents of the several crafts or classes of their employees, requiring, as a condition of continued employment, membership in the labor organization acting as such collective bargaining agent, but subject to a proviso in paragraph (c) of § 152 Eleventh that the requirement of membership in a labor organization in such an agreement should be satisfied (as to an employee engaged in certain services or capacities) by "membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * *" The Act is silent, however, as to the manner in which the qualifications of a labor organization, membership in which will satisfy the requirement of union membership under a union shop agreement made pursuant to the Act, is to be determined.

The court below, and the Court of Appeals for the Second Circuit (*United Railroad Operating Crafts, et al* v. *William Wyer, as Trustee, et al,* 205 Fed. 2d 153, held that it should be determined by the Railroad Adjustment Board as a "dispute between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning pay, rules or working conditions" under 45 U. S. C. A. § 153 First (i), and that the district courts have not been granted jurisdiction to determine issues of this kind. The United States District Court for the Eastern District of Michigan has recently held, however, that the qualification of a labor organization for the exception to the union shop requirement must be determined by a special board established by the National Mediation Board under the procedure provided in

§ 153 First (f) for determining the right to participate in the selection of the labor representatives to the National Railroad Adjustment Board. *Pigott* v. *Detroit, Toledo and Ironton Railroad Co.* 116 Fed. Supp. 949. The First Division of the National Railroad Adjustment Board points out that there has been no final interpretation of the meaning of the words "national in scope", as used in the Union Shop Amendment to the Railway Labor Act, by any tribunal of competent jurisdiction, but it has failed to state or indicate what showing it will accept as sufficient. (Award 16475, Docket 30074, Appendix A, Petitioners' brief).

While this respondent has no interest in which of two or more rival labor organizations its employees shall join, it is obliged to carry out union shop agreements with the collective bargaining agents of its employees, and is, therefore, vitally interested in securing an authoritative decision of the question how the qualification of a labor organization, membership in which, under the provisions of the Act, will satisfy the union membership requirements of its union shop agreements, shall be determined. It believes that many other railroads are vitally concerned with the same question.

This respondent believes that the court below was in error in holding that the Railroad Adjustment Board has exclusive jurisdiction to determine the qualification under the Railway Labor Act of a labor organization to give its members exemption from the membership requirement of union shop agreements. It believes that a controversy over such qualification requires interpretation of the Act of Congress and presents a justiciable question, of which the federal district courts have jurisdiction, unless the Railway Labor Act, properly construed, requires such qualifications to be first

established under the procedure specified in § 153 First (f). Such a controversy does not, in reality, present a dispute "between an employee or group of employees and a carrier * * * growing out of * * * the interpretation or application of agreements concerning pay, rules or working conditions", but presents, instead, a dispute between an employee and his collective bargaining agent growing out of alleged infringement of his statutory rights in the performance of a collective bargaining agreement concerning compulsory union membership, a subject which has nothing to do with pay, rules or working conditions.

Respectfully submitted,

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